FILE COPY

FILED
OCT 6 1947
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 389

THE CANISTER COMPANY,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

WESTON VERNON, JR.,
Counsel for Petitioner.

MILBANK, TWEED, HOPE & HADLEY,
ROBERT L. MERRITT,
CLARENCE E. DAWSON,
Of Counsel.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Jurisdictional statement	5
Questions presented	5
Reasons relied on for allowance of the writ	5
Prayer for writ	8

Table of Cases Cited

Cockcroft v. *Metropolitan Life Insurance Co.*, 125 Pa. Sup. Ct. Rep. 293, 189 Atl. 687	6
Canister Co. v. *U. S.*, 70 Fed. Supp. 904	6
English v. *Johnson*, 17 Cal. 107, 76 Am. Dec. 574	6
Kepner v. *U. S.*, 195 U. S. 100	6
McGrath & Jones v. *Isaacs*, 1 N. & McC. Rep. (9 So. Car.) 563	6
Moore v. *U. S.*, 91 U. S. 270	6
South Carolina v. *U. S.*, 199 U. S. 437	6
United States v. *Harris*, 77 Fed. 821	7
United States v. *Wong Kim Ark*, 169 U. S. 649	6
Western Union Telegraph Co. v. *Call Publishing Co.*, 181 U. S. 92	6
Young v. *The Bank of the State of Alabama*, 5 Ala. (N.S.) 179, 39 Am. Dec. 322	6

Statutes Cited

Cyclopedia of Federal Procedure, Vol. 8, Sec. 3413, p. 30 (2nd Ed. 1943)	7
United States Code, Title 28, Section 288(b), as amended (Act of February 13, 1925, c. 229, Sec. 3, 43 Stat. 936, 939; Act of May 22, 1939, c. 140, 53 Stat. 752)	7
Wharton on Evidence, Vol. 1 (3rd Ed.), Sec. 619	6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 389

THE CANISTER COMPANY,

Petitioner,

against

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, The Canister Company, respectfully shows:

Summary Statement of the Matter Involved

The Court of Claims of the United States ruled that a document which refers on its face to a missing schedule said to be annexed is admissible in evidence over the objections of the opposing party. The ruling was made in denying an application by petitioner for a refund of income tax of $3,351.99, plus interest, which was wrongfully

assessed and which was paid by petitioner to the Collector of Internal Revenue for the Fifth District of New Jersey in respect to the fiscal year ended April 30, 1941.

The judgment of the Court of Claims was entered on April 7, 1947. The opinion written by Judge Whitaker is reported (70 F. Supp. 904). Petitioner's motion for a new trial was overruled on July 7, 1947. The order denying such motion is not yet reported.

The Commissioner of Internal Revenue, in a "deficiency notice" dated June 16, 1947, determined that petitioner overpaid by $3,351.99 its income tax for the fiscal year ended April 30, 1941; he also determined a deficiency of $3,011.88, plus interest, in excess profits tax of petitioner for the same fiscal year, which was paid on January 17, 1945. When petitioner duly filed a claim for refund of the amount of overpayment of income tax which the Commissioner of Internal Revenue had determined petitioner had made, the Commissioner failed to approve such claim although he did not formally disapprove it.

Since statutory determinations by the Commissioner are presumptively correct the respondent had the burden of disproving the accuracy of the Commissioner's determination. In attempting to maintain this burden the respondent undertook to show that petitioner allegedly overstated the bases to it of certain assets which it acquired in 1924 from one Raphael T. Garfein (Gwathmey) in a tax-free exchange and consequently that petitioner took an excessive depreciation deduction for the fiscal year here involved. For all prior fiscal years the Commissioner and his predecessors, in their audits of petitioner's returns and examinations of its books, had determined the bases of the assets in question to be as claimed by petitioner, with minor exceptions. To support his contention and to establish the bases to petitioner of the assets the respondent offered in evidence a photostatic copy (Defendant's Exhibit "D")

of an incomplete bill of sale which had been filed with the County Clerk of Warren County, New Jersey, in 1924. Without a greater showing than this, the Court of Claims erroneously upset administrative determinations of long standing made on the very point here in issue and despite the incompleteness of the document offered by the respondent held that petitioner was not entitled to recover.

Defendant's Exhibit "D" purports to be a certified copy of a bill of sale from The Canister Company of New Jersey (a corporation entirely unrelated to petitioner) to Mr. Gwathmey dated April 22, 1924, and relates to a sale to Mr. Gwathmey for a consideration of $100,000 of "the fibre can business conducted by the party of the first part [The Canister Company of New Jersey], together with the goodwill thereof, and together with the equipment shown upon Schedule 'A' hereto attached." Counsel for petitioner took exception to the introduction of Defendant's Exhibit "D" into evidence on the ground that it was clearly incomplete, Schedule "A" being missing.

The Court of Claims erroneously relied upon Defendant's Exhibit "D" in denying petitioner's claim for repayment of taxes wrongfully assessed and collected. The opinion of the Court of Claims states that:

> "The original of the bill of sale [Defendant's Exhibit 'D'] a copy of which was introduced, was in plaintiff's possession. If plaintiff thought the omitted portion material to the issue, it was available to it and could have been introduced by it. Under such circumstances we do not think it was erroneous to have received the bill of sale without the schedule" (R. 24; 70 F. Supp. at 909).

The Court of Claims assumed in its decision, contrary to the facts and without support in the record or in the findings of fact in this cause, that petitioner is in possession of the original bill of sale. The original of the incomplete

bill of sale introduced by the respondent is not now and has not been in petitioner's possession. Petitioner was not a party to such sale and there is no reason to believe that the original or a copy of the bill of sale is or was in petitioner's possession. The Court has thus based its decision on its own erroneous assumption, not supported either by the record or by justifiable inferences.

The Court of Claims erroneously held that the schedule missing from Defendant's Exhibit "D" "would have added nothing that is material to the issue presented" (R. 24; 70 F. Supp. at 909), for the Court considered that such incomplete document, when taken together with a certain journal entry in petitioner's books of account, established the basis to Mr. Gwathmey, and therefore to petitioner, of certain assets transferred by him to petitioner in 1924 in a tax-free exchange. The error of this is plain, for one of the two factors upon which the Court of Claims relied, namely, Defendant's Exhibit "D", was inadmissible as evidence and could not properly be considered by the Court for *any* purpose. The absence of Schedule "A" from Defendant's Exhibit "D" was fatal to the respondent's cause and the Court of Claims should have so held.

It is impossible to determine from the evidence introduced by the respondent what specific assets supposedly were purchased by petitioner's transferor from The Canister Company of New Jersey in 1924, or what price he paid for them. Neither does the evidence disclose that the depreciable assets owned by petitioner in the fiscal year ended April 30, 1941, were all purchased by its transferor from the same source or that a cost basis other than that employed by petitioner is allocable to each of these assets. Accordingly, the respondent's proof was completely valueless and failed to sustain its defense to this cause of action and it was error for the Court of Claims to hold that the respondent sustained its burden of proof.

Jurisdictional Statement

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by the United States Code, Title 28, Section 288(b), as amended (Act of February 13, 1925, c. 229, Sec. 3, 43 Stat. 936, 939; Act of May 22, 1939, c. 140, 53 Stat. 752).

Questions Presented

1. Whether a document which refers on its face to a missing schedule said to be annexed thereto is admissible in evidence in the Court of Claims over the objection of the opposing party.

2. If a document incomplete on its face and to which petitioner was not a party is admissible in evidence in the Court of Claims, is such a document sufficient (a) to maintain the respondent's burden of proving erroneous a determination by the Commissioner of Internal Revenue in a statutory deficiency notice that petitioner had overpaid its income tax for the fiscal year here involved or (b) to upset bases for depreciation employed by petitioner uninterruptedly for almost twenty years and accepted during that entire period by the Commissioner after audits of petitioner's tax returns?

3. Whether the Court of Claims can base a decision in a case before it on unjustifiable assumptions and supposed facts not supported by the record and not the subject of a special finding of fact by that Court.

Reasons Relied On for Allowance of the Writ

This Court is requested to grant the writ for the following reasons:

1. The Court of Claims summarily passed on the admissibility of Defendant's Exhibit "D", a document incomplete on its face and to which petitioner was not a party,

without considering the case of *Moore* v. *United States*, 91 U. S. 270, in which this Court held that unless Congress otherwise provides (it has not done so on the question here at issue) the Court of Claims must follow the rules of evidence of the common law; the cases of *United States* v. *Wong Kim Ark*, 169 U. S. 649, 654; *South Carolina* v. *United States*, 199 U. S. 437, 449-450; *Kepner* v. *United States*, 195 U. S. 100, 125-126; see *Western Union Telegraph Company* v. *Call Publishing Company*, 181 U. S. 92, 101-102, in which this Court made it clear that in this connection the common law is the common law as of the time of the approval of the Constitution of the United States; and the cases of *Young* v. *The Bank of the State of Alabama*, 5 Ala. (N.S.) 179, 39 Am. Dec. 322 (1843); *English* v. *Johnson*, 17 Cal. 107, 119, 76 Am. Dec. 574 (1860); *Cockcroft* v. *Metropolitan Life Insurance Co.*, 125 Pa. Sup. Ct. Rep. 293, 189 Atl. 687 (1937); *McGrath & Jones* v. *Isaacs*, 1 N. & McC. Rep. (9 So. Car.) 563, 573 (1819); see cases cited in 1 Wharton on Evidence (3rd Ed.) § 619, which state the common law rule that a document which is incomplete on its face is inadmissible over the objection of the opposing party.

2. Assuming arguendo that the patently incomplete copy of the purported bill of sale, to which petitioner was not a party, was admissible in evidence, the introduction of such document by the respondent was insufficient to overcome the presumption of correctness which attaches to the determination of the Commissioner of Internal Revenue in a statutory deficiency notice dated June 16, 1947, that petitioner overpaid by $3,351.99 its income tax for the fiscal year here involved. Determinations in such a notice are presumptively correct, and the burden of proving them incorrect is upon those seeking to upset such determinations. The Court of Claims erroneously failed to find that where the burden of proof is upon the respondent and the deter-

mination sought to be upset exactly conforms with the treatment which the Commissioner had accorded petitioner's tax returns over a period of almost 20 years, then the measure of the respondent's burden of proof is such that it is not met by the introduction of a document to which petitioner was not a party and which is incomplete on its face.

3. The Court of Claims failed to find in its special findings of fact that the original of the bill of sale, a purported copy of which was introduced by the respondent as Defendant's Exhibit "D", was in plaintiff's possession and thus available to it. Indeed the respondent offered no evidence which would support such a finding, for petitioner was not a party to the sale between The Canister Company of New Jersey and Mr. Gwathmey and is not now and has not been in possession of the original of the incomplete purported bill of sale introduced by the respondent. Accordingly, even should this Court now hold that the common law rules of evidence do not govern in the Court of Claims, the supposed rule of law enunciated by the Court of Claims as governing this case does not, on the facts as found by that Court, justify a denial of petitioner's claim and a judgment in favor of the respondent. (See *United States* v. *Harris*, 77 Fed. 821, 825; 8 Cyclopedia of Federal Procedure § 3413, p. 30 (2nd Ed. 1943).) Congress has specifically authorized this Court to review the decision of the Court of Claims in order to rectify this error. (United States Code, Title 28, Sec. 288, as amended by Act of May 22, 1939, c. 140, 53 Stat. 752.)

4. A determination by this Court of the questions presented here are important to the proper administration of the tax laws, and also to the proper administration of justice in the Court of Claims. It is not proper for a court to permit its own assumptions to take the place of competent evidence which should have been produced by

the Government, and the Court of Claims has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Prayer for Writ

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to the Court of Claims of the United States commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record of all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper.

Dated: New York, N. Y., October 6, 1947.

WESTON VERNON, JR.,
Counsel for Petitioner.

MILBANK, TWEED, HOPE & HADLEY,
ROBERT L. MERRITT,
CLARENCE E. DAWSON,
Of Counsel.